

Brar (Migration) [2023] AATA 198 (9 January 2023)

DECISION RECORD

DIVISION:	Migration & Refugee Division
APPLICANT:	Mr Gurvinder Singh Brar
REPRESENTATIVE:	Mr Manjit Singh Johal (MARN: 0851345)
CASE NUMBER:	1837974
HOME AFFAIRS REFERENCE(S):	BCC2016/2189766
MEMBER:	Cheryl Cartwright
DATE:	9 January 2023
PLACE OF DECISION:	Melbourne
DECISION:	The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner) visa: • cl 820.211 of Schedule 2 to the Regulations • cl 820.221 of Schedule 2 to the Regulations

Statement made on 09 January 2023 at 11:17am

CATCHWORDS

MIGRATION –Partner (Temporary) (Class UK) visa – Subclass 820 – parties validly married – Certificate of Marriage provided – mutual commitment to a shared life together – genuine married relationship at the time of decision– parties now have two children – decision under review remitted

LEGISLATION

Migration Act 1958, ss, 5F, 65

Migration Regulations 1994, r 1.15, Schedule 2, cls 820.211, 820.221

CASES

Jayasinghe v MIMA [2006] FCA 1700

Minister for Immigration and Ethnic Affairs v Pochi (1980) 4 ALD 139

He v MIBP [2017] FCAFC 206

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Home Affairs to refuse to grant the applicant a Partner (Temporary) (Class UK) visa under s 65 of the *Migration Act 1958* (Cth) (the Act).
2. The applicant applied for the visa on 28 June 2016 on the basis of his relationship with his sponsor. At that time, Class UK contained only one subclass: Subclass 820 (Partner). The criteria for the grant of this visa are set out in Part 820 of Schedule 2 to the *Migration Regulations 1994* (Cth) (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
3. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl 820.211 because insufficient evidence had been provided to demonstrate that the applicant was the spouse or de facto partner of the sponsor, as defined under section 5F and 5CB of the Migration Act.
4. On 12 December 2018 the applicant applied to the Tribunal for review of the refusal decision. Upon reviewing the submissions and further evidence, the Tribunal considered that, based on the material before it, a hearing was not required and that the review should be decided in the review applicant's favour pursuant to s 360(2)(a).
5. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

CONSIDERATION OF CLAIMS AND EVIDENCE

6. The issue in the present case is whether, at the time of application on 28 June 2016, the applicant and the sponsor were spouses for the purposes of the Act.
7. As Middleton J stated in *Jayasinghe v MIMA* [2006] FCA 1700 at [35]:
 8. Evidence of events subsequent to the visa application is relevant if it 'tends logically to show the existence or non-existence of facts relevant to the issue to be determined': see *Minister for Immigration and Ethnic Affairs v Pochi* (1980) 4 ALD 139 at 160 per Deane J. The Tribunal must consider all relevant evidence, which may include evidence of events subsequent to the date of application insofar as it assists in the task of determining whether the appellant and the sponsor were in a marriage relationship at the time of the application. The question of whether particular evidence is relevant and the weight it is to be given is clearly a matter for the Tribunal.
9. In deciding this matter, the Tribunal has also had regard to evidence of events subsequent to the date of the visa application. In the circumstances of this case, the Tribunal considers that it is appropriate to make findings about cl 820.221 (a time of decision criterion) as well.
10. **Background**
11. The parties met in October 2015, as organised by their families, and a day later they had their first dinner date.

12. They were married the following month and visited India a year later to celebrate with their families.
13. The parties had hoped to build their own home and purchased land, but they sold the land because of expenses in relation to having children.
14. They now have a daughter born in December 2018 and a son born in May 2020 and live with the sponsor's brother.

Whether the parties are in a spouse or de facto relationship

15. Clause 820.211(2)(a) and 820.221 require that at the time the visa application was made, and at the time of this decision, the applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case the applicant claims to be the spouse of the sponsor who is an Australian permanent resident.
16. 'Spouse' is defined in s 5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as a married couple to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s 5F(2)(a)-(d). In forming an opinion about these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the parties' household and their commitment to each other as set out in reg 1.15A(3), which is extracted in the attachment to this decision. Each of the specific matters contained in reg 1.15A(3) is effectively a question which must be answered: *He v MIBP* [2017] FCAFC 206.

Are the parties validly married?

17. If the parties are validly married, they may meet the requirements of a married relationship, but not a de facto relationship.
18. The parties were married on 19 November 2015 at Point Cook, Victoria. A copy of the marriage certificate is on the Department's file. On the evidence, the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s 5F(2)(a).

Are the other requirements for a spouse relationship met?

19. Regulation 1.15A(3) provides relevant factors for determining whether the spousal relationship exists. These factors are (a) the financial aspects of the relationship; (b) the nature of the household; (c) the social aspects of the relationship; and (d) the nature of the persons' commitment to each other.
20. In considering these issues, the Tribunal has had regard to all the documents on the Department's file and the Tribunal's file.

21. *The financial aspects of the relationship*

22. Any joint ownership of real estate or other major assets, any joint liabilities, the extent of any pooling of financial resources, whether one person in the relationship owes any legal obligation in respect of the other and the basis of any sharing of day-to-day household

expenses are relevant factors to consider when assessing the financial aspects of the relationship.

23. There is no evidence before the Tribunal that the parties jointly own real estate or have any joint liabilities or that one person in the relationship owes any legal obligation in respect of the other.
24. The parties provided to the Tribunal bank statements from 2021 to 2022 that show a joint account with deposits of the applicant's salary and regular transfers to the sponsor.
25. In an undated statement provided to the Tribunal and received on 22 November 2022 the parties describe the applicant as the sole income earner and the sponsor as managing the household expenses.
26. The Tribunal notes the lack of evidence about the financial aspects of the relationship provided to the Department and gives little weight to this lack of evidence.
27. The Tribunal notes the bank statements provided to the Tribunal and gives this evidence some weight as demonstrating joint management of the parties' finances.

28. The nature of the household

29. Any joint responsibility for the care and support of children, the living arrangements of the persons and any sharing of the responsibility for housework are relevant matters to be considered when assessing the nature of the household.
30. The parties provided to the Tribunal two birth certificates. The first relates to their daughter, born in Werribee, on 30 December 2018 and the second relates to their son, also born in Werribee, on 27 May 2020.
31. The parties provided numerous photographs of themselves and their children in a range of situations and locations covering the past four years.
32. In their undated statement the parties describe the applicant as being the sole income earner and the sponsor as taking care of household duties.
33. The parties provided the Tribunal with copies of utilities invoices addressed to both parties at the address they and their children share with the sponsor's brother.
34. The Tribunal notes the lack of evidence regarding living arrangements and responsibility for housework provided to the Department and gives little weight to this lack of evidence.
35. The Tribunal notes that the parties now have two children, have a shared household, and that the sponsor takes care of the children and the household duties and gives great weight to this evidence.

36. The social aspects of the relationship

37. Whether the persons represent themselves to other people as being married to each other, the opinion of the persons' friends and acquaintances about the nature of the relationship and any basis on which the persons plan and undertake joint social activities are relevant matters to be considered in determining the social aspects of the relationship.
38. The Tribunal notes that the parties have young children, which limits the opportunities for social engagements. In their joint statement the parties claim to socialise at home and at

friends' homes but have provided no evidence of this. The Tribunal gives the lack of evidence of socialising some weight.

39. The parties provided the Tribunal with a statutory declaration by Amritpal Singh Sandhu dated 5 November 2022 in which Mr Sandhu states that the parties are married and have two children. Mr Sandhu provides a general statement about the parties' relationship.
40. In a statutory declaration by Premjot Kaur Hundal dated 7 November 2022, Ms Hundal states that the parties are married and have two children. Ms Hundal provides a general statement about the parties' relationship.
41. In a statutory declaration by Vicram Singh Pannu dated 5 November 2022, Mr Pannu states that he is a good friend of the applicant and he was part of the parties' wedding in November 2015. Mr Pannu states that the parties have two children and he provides general comment about the relationship.
42. In a statutory declaration by Baldeep Singh Hundal dated 7 November 2022, Mr Hundal states that he has known the applicant for 12 years, that the parties are married and that the parties have two children. Mr Hundal also provides a general statement about the relationship.
43. The Tribunal notes the similarity in the statutory declarations and the lack of individual detail provided and gives these declarations little weight.
44. The Tribunal notes the lack of information about the social aspects of the relationship provided to the Department and gives this lack of information some weight.
45. *The nature of the persons' commitment to each other*
46. The duration of the relationship, the length of time during which the persons have lived together, the degree of companionship and emotional support that the persons draw from each other, and whether the persons see their relationship as long-term are all aspects to be considered in determining the nature of the persons' commitment to each other.
47. The Tribunal notes that, at the time of application, the parties were married for approximately six months, and at the time of this decision they have been married for seven years and now have two children together. The Tribunal gives some weight to this length of time.
48. In his section of the undated joint statement the applicant comments on his admiration for the sponsor who has managed two children under the age of two. The parties both describe how the applicant, when he has time off work, gives the sponsor "a break" from managing the children.
49. The parties state that they have already enrolled the children in the Montessori school in Gisborne and the sponsor will return to work when the children are old enough for formal childcare. The parties state that, with the extra income, they hope to get a loan to purchase a house in the Gisborne area.
50. The Tribunal notes the limited evidence of the parties' commitment to each other provided to the Department and gives little weight to this limited amount of evidence.
51. The Tribunal gives great weight to the parties' undated joint statement in which they describe their commitment to each other and their future plans for a home and for the education of their children.

52. Conclusion

53. The Tribunal notes the evidence about the parties' children and their commitment to their children's future and gives great weight to this commitment.
54. The Tribunal notes the statutory declarations provided by friends of the parties and is disappointed that the friends did not provide personal and detailed information about the parties and therefore gives these documents little weight.
55. The Tribunal notes that the parties plan to begin the process of saving for a home as soon as the sponsor is able to work and help them to qualify for a housing loan and gives great weight to this commitment.
56. After considering all the evidence provided to it, the Tribunal is satisfied that, on balance, at the time of application and at the time of this decision the parties were and are in a committed spousal relationship.
57. As stated above, the Tribunal is satisfied that the parties are validly married, as required by s 5F(2)(a) of the Act.
58. After considering all the evidence before it and for the reasons given with respect to the reg 1.15A(3) matters, the Tribunal is satisfied that, both at the time of application on 28 June 2016 and at the time of this decision, the applicant and the sponsor:
 - had and have a mutual commitment to a shared life as wife and husband to the exclusion of all others, as required by s 5F(2)(b) of the Act;
 - had and have a genuine and continuing relationship, as required by s 5F(2)(c) of the Act; and
 - lived and live together as much as possible as required by s 5F(2)(d)(i) of the Act.
59. Given these findings, the Tribunal is satisfied that, at the time the visa application was made and at the time of this decision, the parties were and are in a spousal relationship. Therefore, the visa applicant meets cls 820.211 and 820.221.
60. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 820 visa.

DECISION

61. The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner) visa:
 - cl 820.211 of Schedule 2 to the Regulations
 - cl 820.221 of Schedule 2 to the Regulations

Cheryl Cartwright
Member

ATTACHMENT - Extract from Migration Regulations 1994

1.15A Spouse

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;

the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).

- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day to day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).